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Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Gardiner, Kamya & Associates, P.C.

File: B-258400

Date: January 18, 1995

Chris G. Gardiner for the protester.
Charles C. Masten, Department of Labor, for the agency.
Katherine I. Riback, Esq., and Paul E. Jordan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly eliminated proposal from competitive range is denied where record shows that agency reasonably concluded, because of large field of superior competing proposals, that protester's proposal had no reasonable chance of award.

DECISION

Gardiner, Kamya & Associates, P.C. protests that the Department of Labor (DOL) improperly excluded its proposal from the competitive range under request for proposals (RFP) No. L/IG 94-02, for accounting and auditing services.

We deny the protest.

The agency issued the RFP on April 1, 1994, seeking proposals for multiple fixed-price, indefinite quantity labor-hour contracts to provide accounting and auditing services on a task order basis for a 1-year base period, with two 1-year options. Awards (of approximately 10 contracts) were to be made on the basis of best value to the government, considering technical merit and price, with technical merit (75 percent) of greater importance. The RFP reserved to the government the right to make awards without holding discussions, and encouraged offerors to submit their best offers in their initial proposals. Technical merit was evaluated in six areas: general qualifications, offeror performance, offeror experience, personnel qualifications and experience, project management, and understanding scope of work. Under project management, the RFP required offerors to set forth the percentage of time that the proposed partners would devote to work on this contract.

The RFP described in detail the work required and how proposals were to be prepared. Offerors were required to propose hourly rates for eight different labor categories. The RFP established as a minimum order, $50,000 of effort with no breakdown between labor categories. It also provided that in no event would any category of labor exceed any of the stated maximum hours of labor. Under the partner/principal labor category, which is of relevance to this protest, the RFP called for a maximum level-of-effort of 4,000 hours. The RFP provides for proposed prices to be evaluated on the basis of the product of the stated maximum number of hours multiplied by the labor category rates for each of the base and option years.

By the May 12 due date for initial proposals, 45 offers were received. In evaluating the proposals, the contracting officer found that approximately half of the offerors had proposed partner/principal personnel available for significantly less than the stated maximum hours for that labor category. In view of the fact that 25 proposals had been received which offered substantially the required maximum number of hours, and considering the projected low technical scores of the 20 proposals that had offered significantly less than the maximum number of hours, the contracting officer determined to eliminate these 20 proposals, including Gardiner's, from the competitive range. Because Gardiner had proposed less than half of the 4,000 maximum hours for partners stated in the RFP, the contracting officer concluded that it had no reasonable chance of receiving the award.

Gardiner protested the elimination of its proposal from the competitive range to our Office.[1]

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[1]Gardiner contends, in part, that the DOL improperly rejected its proposal as "nonresponsive." As the protester correctly points out, the concept of responsiveness--i.e., an unconditional promise to comply with the terms of a solicitation--does not generally apply to negotiated procurements. Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. However, certain terms and obligations of an RFP may be so material that a proposal that fails to comply with them could be rejected as technically unacceptable. Loral Terracom; Marconi Italiana, 66 Comp. Gen. 272 (1987), 87-1 CPD ¶ 182; Computer Mach. Corp., 55 Comp. Gen. 1151 (1976), 76-1 CPD ¶ 358. In any event, Gardiner's proposal was rejected because it had no reasonable chance for award, not simply because of technical noncompliance.

The Federal Acquisition Regulation (FAR) requires contracting officers in a negotiated procurement to determine which proposals are in the competitive range for the purpose of conducting written or oral discussion. FAR § 15.609(a). Further, the FAR provides that the competitive range shall be determined on the basis of cost or price and other factors that were stated in the solicitation and shall include all proposals that have a reasonable chance of being selected for award. Id. However, even where a proposal is fully acceptable technically (or could be rendered so through discussions), it may be excluded from the competitive range if, in light of the competing proposals, the contracting officer determines that the proposal has no reasonable chance of award. Curry Contracting Co., Inc., B-254355, Dec. 13, 1993, 93-2 CPD ¶ 334.

Gardiner contends that it was unreasonable for the agency to eliminate its proposal from the competitive range. In Gardiner's view, the RFP did not require it to propose sufficient personnel to meet the maximum number of hours stated in the RFP.[2] The protester asserts that it has sufficient personnel available and that it could easily correct this deficiency. Thus, it argues that the agency should have evaluated its proposal and conducted discussions with it. We disagree.

Based on our review of the record, the agency's determination to exclude Gardiner's proposal from the competitive range was reasonable and consistent with the evaluation criteria. For each labor category, the RFP advised offerors of the maximum number of hours which could be awarded under a contract and requested offerors to list the number of hours their proposed personnel would be available to perform on the contract. Section M of the RFP advised offerors that their total cost would be evaluated on the basis of the maximum hours for the base and option periods. From this, it is plain that the agency expected offerors to propose sufficient personnel to substantially meet the stated maximum number of hours in each labor category. The protester's proposal generally indicates its understanding of the agency's expectation. While the protester argues that it was unaware of this requirement, it admits that for all labor categories apart from the partner/principal it proposed personnel sufficient to exceed

[2]To the extent the protester is alleging that the RFP was ambiguous with regard to the number of hours an offeror was required to propose, its protest on this ground is untimely. Protests of alleged solicitation improprieties must be filed not later than the closing time for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1994).

the stated maximum hours and in its cost proposal proposed the maximum number of hours.

With regard to the partner/principal category, Gardiner proposed the part-time services of two partners for a total of 1,664 hours of time, which was less than half of the RFP maximum requirement of 4,000 hours. In contrast, the offerors whose proposals were included in the competitive range substantially met or exceeded that requirement.[3] From this, the contracting officer reasonably concluded that it was unlikely that Gardiner was proposing an acceptable level of resources to meet the agency's requirements. Since the resulting evaluation of Gardiner's proposal would have been a very low technical score, the contracting officer reasonably determined not to include Gardiner's offer in the competitive range, in view of the significant number of better proposals received.

An offeror must demonstrate affirmatively the merits of its proposal and runs the risk of rejection if it fails to do so. InterAmerica Research Assocs., Inc., B-253698.2, Nov. 19, 1993, 93-2 CPD ¶ 288. Here, Gardiner's proposal failed to come close to offering the necessary resource commitment, and the agency had no basis to assume that Gardiner would make the major adjustment necessary in its proposal to provide the 4,000 hours of partner time specified in the RFP. More significantly, the contracting officer determined that the 25 better proposals included in the competitive range provided adequate competition. Under these circumstances, the agency properly concluded that Gardiner had no reasonable chance of contract award. See Curry Contracting Co., Inc., supra. Accordingly, the agency's decision not to include Gardiner's proposal in the competitive range was unobjectionable.

The protest is denied.

\s\ Paul Lieberman
for Robert P. Murphy
General Counsel

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[3]For example, one proposal included in the competitive range proposed four partners for a total of 4,300 hours, another proposal proposed five partners for a total of 5,100 hours.